No. 366

In the Supreme Court of the United States

OCTOBER TERM, 1956

ANDREW G. NELSON, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered June 13, 1956, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellant's complaint which sought to set aside an order of the Interstate Commerce Commission directing appellant to cease and desist from conducting certain motor carrier operations found to be unauthorized by its contract carrier's permit.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission misinterpreted the scope of the contract carrier permit which it had issued to appellant's predecessor.

2. Whether the findings of fact made by the Commission were adequate.

3. Whether the Commission's order was vague and indefinite.

STATEMENT

In 1942 the Interstate Commerce Commission issued to appellant's predecessor a contract carrier's "grandfather" permit authorizing the transportation by motor vehicle of "*new and used store fixtures, new and used household goods* and *stock* in trade of drug stores." Appellant's present permit, containing the same authorization, was issued to it in 1951 upon the incorporation of its business.

In 1954 the Commission instituted an investigation to determine whether appellant was transporting commodities not authorized by its permit. After full administrative proceedings, the Commission held that appellant had conducted unauthorized operations (63 M.C.C. 407), and issued a cease-and-desist order. The Commission ruled (*id.*, p. 411) that the phrase "*stock* in trade of drug stores" in appellant's permit authorized only the transportation of merchandise actually or ultimately destined for drugstores, and not of merchandise which, although of the kind that might be stocked in drug stores, was not in fact so destined.

On appeal, a three-judge district court (one judge dissenting) upheld the Commission's cease-and-desist order. The court rejected appellant's contention that the order had "whittled down" appellant's "grand-

father" permit; held that appellant had been accorded a full and fair hearing; and ruled that the Commission's findings were supported by substantial evidence.

ARGUMENT

1. Appellant's principal contention (Jurisdictional Statement, 14-21) is that the Commission has misinterpreted its own permit. It argues that the phrase "*stock* in trade of drug stores" is not limited, as the Commission held, to merchandise actually destined for drug stores, but covers any merchandise which may be stocked by drug stores.

We submit, however, that the Commission correctly concluded that appellant's permit authorizes it to carry only stock in trade which is intended for drug stores, and not all merchandise which conceivably might be sold there. Appellant's interpretation of its permit would authorize the carriage of all the myriad commodities which a modern drug store handles, such as electrical appliances and equipment, phonograph records, cameras, books, athletic equipment, hardware, etc. In short, appellant would broaden the grant of limited operating authority contained in the original permit to the point where it would almost constitute authority to haul general commodities.

Appellant contends that the phrase "stock in trade of drug stores" was intended as a commodity description, and that the Commission, by construing the phrase with reference to the intended use to be made of the commodities, has in fact curtailed the scope of the original operating authority. But construing a permit "takes no rights" away from the operator; it "merely interpret[s] what rights he had from the beginning." *Willers* v. *United States*, 133 F. Supp. 270, 275

(D.S.D.). The Commission "from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: * * * (c) by reference to the intended future use." *C & H Transp. Co.*, 62 M.C.C. 586, 587. The "intended use" standard has been sustained by the courts (*Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (D. Minn.), affirmed, 345 U.S. 980; *Converse* v. *United States*, 109 F. Supp. 807 (N.D. Cal.)), and the Commission did not err in applying it in interpreting appellant's permit. Finally, since the Commission held that the commodity description was not ambiguous, it was not required to consider the alleged actual operations conducted by appellant's predecessor during the grandfather period. See *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793, 796 (D.N.J.), affirmed, 350 U.S. 921; *Pomprowitz* v. *United States*, 119 F. Supp. 824, 827 (E.D. Wisc.), affirmed, 348 U.S. 803.

It is well settled that the Commission's interpretation of its own permits and certificates is controlling unless clearly unreasonable.[1] Plainly, the Commission was not unreasonable in construing appellant's permit as authorizing only the transportation of stock in trade intended for drug stores. In any event, the meaning

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[1] *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830; *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S.D.N.Y.), affirmed, 324 U.S. 824; *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, 949 (N.D. Ala.), affirmed, 344 U.S. 925; *Converse* v. *United States*, 109 F. Supp. 807, 808 (N.D. Cal.); *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U.S. 980; *Salvino* v. *United States*, 119 F. Supp. 277, 281 (W.D. Wash.).

of the particular phrase used in this permit is not a question of sufficient substance to warrant further review by this Court.

2. Appellant next contends (Jurisdictional Statement, 21-23) that the Commission erred in failing to make adequate findings with respect to (a) the operations actually conducted during the grandfather period, and (b) whether the other portions of its permit, which authorizes carriage of "store fixtures" and "household goods," cover the transportation here involved.

As we have noted (*supra*, p. 4), since the provision relating to "stock in trade of drug stores" is not ambiguous, the Commission was not required to consider —or to make findings concerning—actual operations during the grandfather period. Moreover, the examiner (whose report the Commission adopted with minor modifications, Jurisdictional Statement, 34) did make findings with respect to the circumstances surrounding the original issue of the permit (Jurisdictional Statement, 38-39), and those findings refute appellant's contention that the permit gave it less authority than it was entitled to.

With respect to the contention as to "store fixtures" and "household goods," the Commission specifically found (Jurisdictional Statement, 30-31) that the commodities which appellant had carried did not come within those categories. Further, it cannot seriously be contended that such commodities as canned or packaged grocery items, milk products, beer and wine, glue, and automobile batteries (Jurisdictional Statement,

35) constitute either "store fixtures" or "household goods."[2]

3. Finally, appellant argues (Jurisdictional Statement, 23-24) that the Commission's order is vague and indefinite. The order (Jurisdictional Statement, 42) directed appellant to cease and desist "from the operations * * * found in said report to be unauthorized and unlawful." In its report, the Commission found (Jurisdictional Statement, 33-34) that appellant's transportation of "commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store" was unlawful and should be discontinued. Similar cease-and-desist orders consistently have been upheld as not unduly vague. *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S.D. Iowa), affirmed, 335 U.S. 875; *Consolidated Flower Shipments* v. *Civil Aeronautics Board*, 213 F. 2d 814, 818 (C.A. 9); cf. *Arrowhead Freight Lines, Ltd.* v. *United States*, 115 F. Supp. 537, 545 (S.D. Calif.).

[2] Each of the forty-eight shipments proved at the hearing consisted of a full truckload of one of the commodities indicated (Tr., Ex. 2).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted,

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